IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VIRGIL W. VELKOV, Appellant.	No. 40130-4-II UNPUBLISHED OPINION

Penoyar, C.J. — Virgil Velkov appeals an order of restitution entered following his conviction for fourth degree assault, arguing that (1) the trial court failed to determine the amount of restitution he owed within the statutorily required period, (2) the trial court entered the order due to ineffective assistance of counsel, and (3) insufficient proof existed of a causal connection between his criminal act and the restitution ordered. Because the trial court did not enter the restitution order within the statutorily required period, we reverse and remand to the trial court with instructions to vacate the portion of the order requiring Velkov to pay restitution to the victim and the victim's insurance company.

FACTS

On May 10, 2009, Ashley Abrams went camping at Lilliwaup campground with Matthew Johnson, Brandon Harrison, Ashlee DeMoss, and Tiffany Bartley. Sometime during that evening, while taking a stroll through the campground, Abrams noticed a second group of campers. The second group included Velkov, Talon Newman, Dennis Simons, Jeff Baker, and Justin Wright.

That night, members of Velkov's group visited Abrams's campsite on three separate occasions. The first two encounters involved friendly socializing. The second time that Velkov's

group approached the campsite, Johnson had out his shotgun. He locked the weapon in his truck as the group entered their camp because it would be "inappropriate to have it out with strangers coming into the campsite." Report of Proceedings (RP) at 30.

Unlike the first two visits, the third visit began with a "bad vibe." RP at 98. As members of Velkov's group entered the campsite, they began cursing and asking about Johnson's shotgun, which they believed had been "cocked" in front of them. RP at 34. At this point, Newman punched Johnson several times without provocation. Abrams got up to defend Johnson and received a blow that knocked him to the ground. Abrams testified that he thought the punch came from an individual wearing an orange sweatshirt. Abrams testified that he believed that the first blow, the one that knocked him down, broke his jaw.

While Abrams knelt on the ground, several people began punching and kicking him. Bartley testified that Velkov wore the orange sweatshirt and that she saw him and another person punching Abrams. She stated that Newman later joined the two in attacking Abrams. DeMoss testified that at least three people, including the person wearing the orange sweatshirt, struck Abrams while he crouched on the ground; she testified that this group did not include Velkov. Simons testified that Newman, Velkov, and Wright all struck Abrams, and that Velkov punched and kicked Abrams in the face while Abrams crouched on the ground.

Velkov made a statement to Mason County Detective Luther Pittman several days after the incident. After waiving his *Miranda*[1] rights, Velkov admitted to striking Abrams several times while Abrams knelt on the ground. Velkov claimed that he did not enter the fray until after Abrams began struggling with Wright. While speaking with Velkov, Pittman noticed injuries on

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Velkov's hands possibly consistent with punching someone's mouth.

Newman also told the police that he had struck Abrams. Newman's statement indicated that he had hit Abrams "hard." RP at 67. Pittman testified that the police believed that Baker might have worn the orange sweatshirt on the night of the assault, although he also indicated that the police believed it was possible the person in the orange sweatshirt had been pulling Velkov off the victim during the fight.

The parties stipulated that the fight resulted in a fracture of Abrams jaw. He required surgery, which involved wiring his jaw shut to allow it to heal. He lost 25 pounds and continues to suffer lasting effects from the damage to his mouth.

The State charged Velkov with second degree assault, acting either as a principal or as an accomplice.[2] The jury found him guilty of the lesser-included offense of fourth degree assault.[3]

On December 7, 2009, the trial court sentenced Velkov. At sentencing, the trial court did not determine the amount of restitution Velkov owed; however, the judgment and sentence ordered joint and several restitution liability for Velkov and Newman.

The trial court apparently entered an order of restitution against Newman on February 22, 2010. This order determined the amount of restitution Newman owed, as well as the appropriate payments to the parties.

On March 24, 2010, the trial court entered findings of fact, conclusions of law, and an order of an unspecified amount of restitution against Velkov. On June 2, 2010, the Department of Labor and Industries (L & I) requested that Newman and Velkov pay $201.87 in restitution to

[2] RCW 9A.08.020; RCW 9A.36.021(1)(a).

[3] RCW 9A.36.041(1).

the crime victims compensation fund (CVCF) for expenditures related to the assault. On July 13, 2010, the trial court determined the amount of restitution Velkov owed by entering an amended order of restitution. This order required Velkov to pay Abrams $3,693.22 and Abrams's insurance company $10,078.52. The trial court ordered $201.87 restitution to the CVCF as part of the amended order. Velkov appeals.

ANALYSIS

I. Timeliness of the Order

Velkov argues that the trial court failed to comply with RCW 9.94A.753(1) by determining the amount of restitution owed to Abrams and his insurance company after the statutory period for ordering restitution, 180 days, had expired. However, he concedes that the trial court had the authority to order him to pay restitution to L & I under RCW 9.94A.753(7) because the trial court entered this order within one year of his sentencing. We agree with both propositions.

The trial court's ability to impose restitution derives from statutory authority, not from any inherent power of the court. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Failure to comply with the provisions of the statute authorizing restitution voids a restitution order. *State v. Johnson*, 96 Wn. App. 813, 815, 981 P.2d 25 (1999). Generally, we review a trial court's compliance with a statute de novo. *Johnson*, 96 Wn. App. at 816.

Under RCW 9.94A.753(1), "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." The use of the word "shall" creates a mandatory time limit; a trial court may not enter an order determining restitution after the statutory period has expired. *State v. Krall*, 125 Wn.2d 146, 147-

49, 881 P.2d 1040 (1994) (holding that the legislature's use of the word "shall" in former RCW 9.94A.142(1) (1994), *recodified as* RCW 9.94A.753(1), is a mandatory directive to determine restitution within the statutory period). Because of this mandate, we have repeatedly vacated restitution orders that did not set the amount of restitution within the statutory period. *See State v. Burns*, 159 Wn. App. 74, 244 P.3d 988 (2010); *see also State v. Tetreault*, 99 Wn. App. 435, 998 P.2d 330 (2000).

Even when the trial court orders restitution at sentencing, we will vacate the order if the trial court does not determine the amount of restitution owed within the statutory period. *Burns*, 159 Wn. App. at 76. In *Burns*, the defendant had stolen money from his employer and the trial court ordered him to pay nearly $9,000 in restitution for the charged crimes "'plus any additional restitution' for [his] uncharged crimes." *Burns*, 159 Wn. App. at 77. After the statutory 180-day period lapsed, the trial court determined that the defendant owed more than $73,000 in restitution to his employer for the uncharged crimes. *Burns*, 159 Wn. App. at 77. On appeal, the State argued that the trial court had timely determined restitution by entering the order for any additional restitution for uncharged crimes at sentencing. *Burns*, 159 Wn. App. at 79-80. The State argued that the trial court could validly modify this judgment to include the amount under the terms of RCW 9.94A.753(4).[4] *Burns*, 159 Wn. App. at 79. However, Division One of this court held that the order for restitution for the uncharged crimes, without an amount, did not "determine" that restitution as required by the statute; thus no restitution existed to modify. *Burns*, 159 Wn. App. at 79. Because the trial court determined the actual amount of restitution

[4] RCW 9.94A.753(4) allows the court to modify the restitution portion of the sentence at any time during the court's supervision of the offender.

with an order after the statutory deadline, Division One reversed the trial court and remanded for vacation of the restitution order. *Burns*, 159 Wn. App. at 76, 81, 82.

Similarly, here the trial court did not determine the amount of restitution owed by Velkov until the July 13, 2010 order. As in *Burns*, the trial court ordered restitution at sentencing without determining the amount of restitution the defendant owed. Further, the trial court did not determine the actual amount of restitution with an order until the statutory period had lapsed. We vacate the restitution order as untimely due to the failure to fix an amount of restitution within the 180-day period RCW 9.94A.753(1) requires.

The State contends that the trial court met the statutory deadline for determining the amount of restitution. First, the State argues that (1) the trial court entered a restitution order against Velkov on March 24, 2010 declaring that he shared joint and several liability with Newman; (2) the trial court had previously entered a restitution order determining the amount of restitution Newman owed on February 22, 2010; and thus (3) the trial court essentially determined Velkov's liability with the March 24 order. However, the February 22 order against Newman is not in the record designated for appeal; we may not consider it. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Even if the February 22 order against Newman had been designated for appeal, we reject the State's argument for due process reasons. The February 22 order was entered for a different defendant with a different cause number than the case involving Velkov. No evidence in the record indicates that Velkov had notice of the hearing resulting in the order or an opportunity to be heard in the matter.[5] Division One of this court vacated a restitution order when the defendant

[5]As a further reason to reject consideration of the February 22 order to determine restitution

received no notice of the hearing determining the amount of restitution. *State v. Saunders*, 132 Wn. App. 592, 608, 132 P.3d 743 (2006). Similarly, we reject the State's argument because the record does not reflect that Velkov had notice of the hearing.

The State also argues that the trial court met the statutory period because it entered a timely order of restitution to the CVCF. The suggestion is that, having timely set restitution for one victim, the trial court had the power to modify the restitution order outside of the 180-day period by adding another victim. RCW 9.94A.753(7) allows the trial court to order restitution to the CVCF within one year of the defendant's judgment and sentence. The trial court may modify the "amount, terms, and conditions" of restitution at any time the defendant remains under the trial court's jurisdiction. RCW 9.94A.753(4).

But in *Burns*, Division One rejected an attempt to determine the amount of restitution owed to a victim after the expiration of the statutory period. *Burns*, 159 Wn. App. at 78. Division One held that the trial court could not modify a restitution order if the trial court had not properly determined the amount of restitution in the first place. *Burns*, 159 Wn. App. at 78. Just as in *Burns*, the trial court here failed to determine restitution to Abrams and his insurer within the 180-day period that RCW 9.94A.753(1) requires. Even with a valid restitution order with regard to the CVCF, the trial court did not determine the amount of restitution Velkov owed Abrams within the statutory period. We hold that the trial court cannot modify a restitution order as to a victim when it did not validly determine restitution for that victim under RCW 9.94A.753(1)

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against Velkov, we note that Newman may not have represented Velkov's interest when the trial court determined restitution. They shared joint and several liability. While Newman may have represented Velkov's interest in minimizing the amount of restitution owed, he had an incentive to make sure that Velkov did not change the apportionment of blame in a manner hostile to Newman's interests.

within the statutorily required period.

II. Ineffective Assistance of Counsel

Velkov argues that he received ineffective assistance of counsel because his attorney did not object to the untimely entry of the restitution order against him. He makes this argument as an alternative means of contesting the restitution order and notes that, should we determine that his counsel failed to preserve an objection to the restitution order, he should have the right to challenge the order because of the ineffective assistance of counsel. Because we address the merits of Velkov's challenge to the restitution order, we need not consider his ineffective assistance of counsel claim.

III. Causation

Velkov also argues that the trial court erred by entering the restitution order against him because no causal link exists between the crime the jury convicted him of and the restitution ordered. He claims that the jury rejected second degree assault, which requires substantial bodily harm to the victim, and instead found him guilty of fourth degree assault, which carries no such requirement. He maintains that the evidence does not indicate that he caused the damage to the victim; instead, he contends that the record shows that numerous other individuals struck the victim and likely caused his injuries. We reject his challenge.

The trial court may order restitution when it finds the defendant's "crime in question" causally related to the victim's loss. *State v. Thomas*, 138 Wn. App. 78, 82, 155 P.3d 998 (2007). If the State proves that, but for the criminal act, the victim would not have suffered the loss by a preponderance of evidence, the trial court may order restitution. *Thomas*, 138 Wn. App. at 82.

Velkov's argument fails. The jury's verdict on a lesser-included charge did not prevent

the trial court from finding at sentencing that the State had proven by a preponderance of evidence that Velkov's "crime in question," fourth degree assault, caused the victim's injuries. The testimony of several witnesses supports the trial court's finding: both Bartley and Simons testified that Velkov struck the victim. Bartley testified that Velkov wore an orange sweatshirt and that she saw him striking the victim, and Abrams testified he thought the blow that broke his jaw came from the individual in the orange sweatshirt. Simons testified that he saw Velkov strike the victim in the face. Further, Pittman testified that Velkov admitted to striking the victim several times and that his hands evidenced wounds possibly consistent with striking someone's mouth. While Velkov contends that the record indicates others struck the victim, his contention is irrelevant. Sufficient testimony supports the court's finding that the State had proven Velkov caused the victim's injury by a preponderance of the evidence. We reject Velkov's challenge.

We reverse and remand to the trial court with instructions to vacate the restitution order, except for the portion ordering Velkov to pay the CVCF $201.87 in restitution.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Johanson, J.